TNT Express Worldwide (M) Sdn Bhd v Mega Security Devices (M) Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL APPEAL PA-12BNCVC-23–11 OF 2019
ANAND PONNUDURAI J
23 JUNE 2022

Contract — Construction of terms of contract — Limitation — Limitation of liability — Courier services contract — Mis-delivery or non-delivery of goods within reasonable time — Whether liability limited by terms and conditions of contract — Whether Warsaw Convention and Montreal Convention applicable — Whether exemption clause contravened s 29 of Contracts Act 1950 — Whether there was breach of contract — Contracts Act 1950 s 29

Damages — Assessment — Remoteness of damages — Action premised on negligence — Trial court awarded damages — Whether liability to pay damages limited by terms and conditions of contract — Whether damages awarded by trial court too remote

Tort — Negligence — Carriage of goods by air — Mis-delivery or non-delivery of goods within reasonable time — Whether there was a breach of duty — Whether negligence established

The respondent was a company specialised in security labels whereas the appellant was a company which provided courier services. The respondent had utilised the appellant's services to send two packages of goods weighing 7.47kg ('the goods') to their customer, Trans-Fast Logistics Ltd ('TFL') in Macau. The problem arose when the goods were not sent within the stipulated time ie, on 27 March 2017 or 31 March 2017 and worst, the goods were wrongly sent to Dubai instead of Macau. The respondent had filed an action in the sessions court against the appellant premised on the cause of action of negligence and claimed for: (a) damages amounting to RM892,092 being the loss of benefit of the order and revenue it would have received as TFL had terminated future orders of 4 million security labels; and (b) damages in the sum RM2,372.89 being the loss sustained as a result of the failure to ship the goods to Macau. In defence, the appellant, inter alia, stated that based on the consignment note which constituted contract between the parties, the appellant's liability for loss, damage and delay was limited by the Warsaw Convention ('the WC'), the Montreal Convention ('the MC') and the appellant's terms and conditions as followed: (i) cl 18(a) which provided that notification of loss must be within

21 days (which was not done by the respondent) and that loss was limited to 17 special drawing rights ('SDR') per kg according to the WC and MC; (ii) in any event, cl 12 of the terms and conditions limited the appellant's liability to 17 Euros per kg; and (iii) pursuant to cl 13, the appellant was not liable for any loss of income etc arising from any breach. It ought to be noted that the appellant's terms and conditions comprised of the short form version ('exh D8') and the long form version ('exh D9'), both of which were accepted by the respondent. The sessions court judge ('the SCJ') found that: (A) the Conventions were inapplicable on the basis that the appellant was not a high contracting party or a state party and that the Conventions were only applicable to 'cargo' (the appellant's witness had testified that the respondent's consignment was not 'cargo'); (B) cl 12(1)(a) of the terms and conditions was a standard and unilateral clause indirectly forced on the respondent and the appellant's witness ('SD1') had testified that it was an ambiguous clause; and (C) cl 13(1) which was the exclusion of liability clause was void by reason of s 29 of the Contracts Act 1950 ('the CA') and the decision of the Federal Court in the case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1 ('*CIMB*'s case'). At the conclusion of the trial, the SCJ allowed the respondent's action for negligence and awarded costs in the sum of RM15,000 to the respondent. The issues to be determined in the present appeal were: (1) what was the contract and whether there was a breach by the appellant; and (2) the applicability of the WC and/or the MC and/or the limitation of liability under the terms and conditions of the contract.

Held, allowing the appeal in part, affirming the SCJ's finding on negligence, reducing the damages to an amount of RM578.94 and reducing the costs to a sum of RM10,000:

(1) Based on the facts, there was no doubt that the terms and conditions which regulated the contract were those contained in exhs D8 and D9. The respondent had at the point of executing the consignment agreed that those terms would be general conditions that bound the contract (see para 23).

(2) The fact that the terms and the consignment note did not specify a time for delivery did not mean that the time to deliver was at large. Delivery ought to be made within a reasonable period and most certainly to the proper addressee, but this was not done in the present case. The facts that the consignment note which described the service as 'express' and the tracking of shipment where the estimated delivery was before 6pm on 27 March 2017 were sufficient to cast an obligation or duty upon the appellant to have delivered the goods to the intended addressee by the 27 March 2017 or 31 March 2017 at the latest. The appellant was therefore negligent when they did not deliver the goods to the intended addressee by the end of March 2017 (see paras 25 & 27–28).

(3) There was merit in the appellant's submission that the learned SCJ had erred when he held that the Conventions were inapplicable on the basis that the appellant was not a high contracting party or a state party. A high contracting party and a state party did not refer to the appellant per se but rather the countries that were signatories to the Convention. In this regard, Macau and Malaysia had been certified as state parties to the Carriage by Air Conventions. However, in relation to reference to 'cargo', the appellant's own witness's testimony stated that the goods were not and could not be considered as cargo. Under such circumstances, on the basis that the consignment was not 'cargo', it was arguable that the Conventions did not apply (see paras 32–34).

(4) The court found that the appellant's liability was limited by virtue of the agreed terms and conditions of contract. Clause 12(1)(c) limited the liability for loss, damage, mis-delivery or non-delivery of any shipment but the SCJ made no reference to the said clause in the ground of judgment and only referred to cl 12(1)(a). Clause 12(1)(a) was not ambiguous, and neither was there any evidence that it was unilaterally imposed on the respondent. The SCJ ought not to have merely relied on SD1's testimony in this regard but had a duty to determine for himself whether it was ambiguous which he did not do. In relation to cl 13(1), reliance on the *CIMB*'s case was erroneous as the facts there were very different. Firstly, the *CIMB*'s case concerned a clause which provided for an absolute exclusion of liability whereas in the present case, cl 13(1) only excluded the appellant's liability which fell within the second limb of the rule in the case of *Hadley & Anor v Baxendale & Ors* [1854] EWHC Exch J70. As such, since cl 13 did not bar claims under the first limb of *Hadley v Baxendale*, it did not contravene s 29 of the CA. Based on the above findings, cl 12(1)(c) of the terms and conditions was applicable, as such, the appellant's liability for the mis-delivery or non-delivery should be limited to 17 Euros per kilogram. The court agreed with the appellant that the awarding of the amount of RM892,092 was erroneous on the facts of this case as being too remote (see paras 36–39, 41 & 45).

(5) In relation to appellate intervention, the two important tests were the 'plainly wrong' test and 'insufficient judicial appreciation of evidence' test whereby the appellate court must be satisfied that the findings of the trial judge were clearly wrong and could not be justified on the available evidence. In the present case, based on the above reasons, the court held that appellate intervention was warranted as the SCJ's findings were erroneous in light of the terms and conditions of the agreement which bound the parties (see paras 19–20 & 46).

[Bahasa Malaysia summary

Responden adalah sebuah syarikat yang pakar berkaitan dengan label keselamatan manakala perayu adalah syarikat yang menyediakan

perkhidmatan kurier. Responden telah menggunakan perkhidmatan perayu untuk menghantar dua bungkusan barang seberat 7.47kg ('barang tersebut') kepada pelanggan mereka, Trans-Fast Logistics Ltd ('TFL') di Macau. Masalah timbul apabila barang tersebut tidak dihantar dalam masa yang ditetapkan iaitu pada 27 Mac 2017 atau 31 Mac 2017 dan yang lebih teruk, barang tersebut tersalah hantar ke Dubai dan bukannya ke Macau. Responden telah memfailkan tindakan di mahkamah sesyen terhadap perayu berdasarkan kausa tindakan kecuaian dan menuntut: (a) ganti rugi berjumlah RM892,092 kerana kehilangan manfaat pesanan dan hasil yang akan diterimanya memandangkan TFL telah menamatkan pesanan masa hadapan bagi 4 juta label keselamatan; dan (b) ganti rugi dalam jumlah RM2,372.89 sebagai kerugian yang dialami akibat kegagalan menghantar barang ke Macau. Dalam pembelaan, perayu, antara lain, menyatakan bahawa berdasarkan nota konsainan yang membentuk kontrak antara pihak-pihak, liabiliti perayu untuk kerugian, kerosakan dan kelewatan dihadkan oleh Konvensyen Warsaw ('KW'), Konvensyen Montreal ('KM') dan terma-terma dan syarat-syarat perayu seperti berikut: (i) klausa 18(a) yang memperuntukkan pemberitahuan kerugian mestilah dalam tempoh 21 hari (yang tidak dilakukan oleh responden) dan kerugian tersebut dihadkan kepada 17 pengeluaran khas hak ('SDR') setiap kg mengikut KW dan KM; (ii) dalam apa jua keadaan, klausa 12 terma-terma dan syarat-syarat tersebut mengehadkan liabiliti perayu kepada 17 Euro per kg; dan (iii) menurut klausa 13, perayu tidak bertanggungjawab ke atas apa-apa kehilangan pendapatan dsb yang timbul daripada apa-apa pelanggaran. Perlu diambil perhatian bahawa terma-terma dan syarat-syarat perayu terdiri daripada versi pendek ('eksh D8') dan versi panjang ('eksh D9'), yang kedua-duanya telah dipersetujui oleh responden. Hakim mahkamah sesyen ('HMS') mendapati bahawa: (A) Konvensyen-Konvensyen tersebut tidak terpakai kerana perayu bukan pihak yang berkontrak tinggi atau pihak negeri dan Konvensyen-Konvensyen tersebut hanya terpakai untuk 'kargo' (saksi perayu telah memberi keterangan bahawa konsainan responden bukan 'kargo'); (B) klausa 12(1)(a) terma-terma dan syarat-syarat tersebut ialah klausa standard dan unilateral yang secara tidak langsung dipaksa ke atas responden dan saksi perayu ('SD1') telah memberi keterangan bahawa ia adalah klausa yang samar-samar; dan (C) klausa 13(1) yang merupakan klausa pengecualian liabiliti adalah terbatal disebabkan oleh s 29 Akta Kontrak 1950 ('AK') dan keputusan Mahkamah Persekutuan dalam kes *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1 ('kes *CIMB*'). Pada akhir perbicaraan, HMS membenarkan tindakan responden yang berasaskan kecuaian dan memberikan kos berjumlah RM15,000 kepada responden. Isu-isu yang perlu ditentukan dalam rayuan ini ialah: (1) apakah kontrak yang dimaksudkan dan sama ada terdapat kemungkiran oleh perayu; dan (2) kebolehgunaan KW dan/atau KM dan/atau had liabiliti di bawah terma-terma dan syarat-syarat kontrak.

Diputuskan, membenarkan sebahagian rayuan, mengesahkan dapatan HMS

berkaitan kecuaian, mengurangkan gantirugi kepada RM578.94 dan mengurangkan kos kepada RM10,000:

(1) Berdasarkan fakta, tidak ada keraguan bahawa terma-terma dan syarat-syarat yang mengawal selia kontrak adalah yang terkandung dalam eksh D8 dan D9. Semasa menandatangani konsainan tersebut responden telah bersetuju bahawa terma-terma tersebut adalah syarat-syarat am yang mengikat kontrak (lihat perenggan 23).

(2) Hakikat bahawa terma-terma dan nota konsainan tidak menyatakan masa untuk penghantaran tidak bermakna masa untuk menghantar adalah bebas. Penghantaran harus dibuat dalam tempoh yang munasabah dan pastinya kepada penerima yang sepatutnya, tetapi ini tidak dilakukan dalam kes ini. Fakta bahawa nota konsainan yang menyifatkan perkhidmatan sebagai 'ekspres' dan pengesanan penghantaran di mana anggaran penghantaran adalah sebelum jam 6 petang pada 27 Mac 2017 adalah mencukupi untuk memberikan tugas atau kewajipan kepada perayu untuk menghantar barang tersebut kepada penerima yang dimaksudkan selewat-lewatnya pada 27 Mac 2017 atau 31 Mac 2017. Oleh itu perayu telah cuai apabila dia tidak menghantar barang kepada penerima yang dimaksudkan pada akhir Mac 2017 (lihat perenggan 25 & 27–28).

(3) Terdapat merit dalam hujahan perayu bahawa HMS yang bijaksana telah terkhilaf apabila beliau berpendapat bahawa Konvensyen-Konvensyen tersebut tidak terpakai atas dasar bahawa perayu bukanlah pihak yang berkontrak tinggi atau pihak negeri. Pihak berkontrak tinggi dan pihak negeri tidak merujuk kepada perayu semata-mata sebaliknya negara-negara yang menandatangani Konvensyen-Konvensyen tersebut. Dalam hal ini, Macau dan Malaysia telah diperakui sebagai pihak negeri kepada Konvensyen-Konvensyen Pengangkutan melalui udara. Bagaimanapun, berhubung rujukan kepada 'kargo', keterangan saksi perayu sendiri menyatakan bahawa barang tersebut bukan dan tidak boleh dianggap sebagai kargo. Dalam keadaan sedemikian, atas dasar konsainan itu bukan 'kargo', boleh dipertikaikan bahawa Konvensyen-Konvensyen tersebut tidak terpakai (lihat perenggan 32–34).

(4) Mahkamah mendapati bahawa liabiliti perayu adalah terhad berdasarkan terma-terma dan syarat-syarat kontrak yang dipersetujui. Klausa 12(1)(c) mengehadkan liabiliti untuk kehilangan, kerosakan, salah hantar atau tidak hantar apa-apa penghantaran tetapi HMS tidak membuat rujukan kepada klausa tersebut dalam alasan penghakiman dan hanya merujuk kepada klausa 12(1)(a). Klausa 12(1)(a) tidak samar-samar, dan juga tiada keterangan bahawa ia dipaksa secara unilateral ke atas responden. Hakim mahkamah sesyen sepatutnya tidak hanya bergantung kepada keterangan SD1 dalam hal ini tetapi mempunyai kewajipan untuk

menentukan sendiri sama ada ia adalah samar-samar yang mana kewajipan ini tidak dilakukannya. Berhubung dengan klausa 13(1), pergantungan kepada kes *CIMB* adalah salah kerana fakta kes tersebut sangat berbeza. Pertama, kes *CIMB* melibatkan klausa yang memperuntukkan pengecualian mutlak liabiliti manakala dalam kes ini, klausa 13(1) hanya mengecualikan liabiliti perayu yang termasuk dalam bahagian kedua peraturan dalam kes *Hadley & Anor v Baxendale & Ors* [1854] EWHC Exch J70. Oleh yang demikian, memandangkan klausa 13 tidak menghalang tuntutan di bawah bahagian pertama peraturan dalam *Hadley v Baxendale*, ia tidak melanggar s 29 AK. Berdasarkan dapatan-dapatan di atas, klausa 12(1)(c) terma-terma dan syarat-syarat tersebut adalah terpakai, oleh itu, liabiliti perayu untuk salah hantar atau tidak hantar hendaklah dihadkan kepada 17 Euro bagi setiap kilogram. Mahkamah bersetuju dengan perayu bahawa pemberian jumlah RM892,092 adalah salah berdasarkan fakta kes kerana ia tidak boleh dijangka (lihat perenggan 36–39, 41 & 45).

(5) Berhubung dengan campur tangan rayuan, dua ujian penting ialah ujian 'plainly wrong' dan ujian 'insufficient judicial appreciation of evidence' di mana mahkamah rayuan mesti berpuas hati bahawa dapatan hakim bicara adalah jelas salah dan tidak boleh dibenarkan berdasarkan keterangan yang ada. Dalam kes ini, berdasarkan alasan-alasan di atas, mahkamah berpendapat bahawa campur tangan rayuan adalah wajar kerana dapatan-dapatan HMS adalah salah berdasarkan terma-terma dan syarat-syarat perjanjian tersebut yang mengikat pihak-pihak (lihat perenggan 19–20 & 46).]

Cases referred to

Air India Ltd v Tej Shoes Exporters P Ltd & Another [LNIND] [2013] DEL 1119, HC (refd)

CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1; [2019] 2 CLJ 1, FC (distd)

Hadley & Anor v Baxendale & Ors [1854] EWHC Exch J70 (refd)

India Airlines v Angelique International Ltd & Another [LNIND] [2014] DEL 5627, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Meuban Engineering & Equipment Sdn Bhd v MBF Insurans Bhd [2014] 2 MLJcon 137; [2009] 7 CLJ 527, HC (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors and another appeal [2019] MLJU 38; [2019] 3 MLRA 322, CA (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113, SC (refd)

Legislation referred to

Carriage by Air Act 1974 s 6
Contracts Act 1950 ss 29, 74

Mubashir bin Mansor (with Raja Nadhil Aqran) (Skrine) for the plaintiff.
Rajivan Nambiar (Reza Rahim & Rajivan) for the defendant.

Anand Ponnudurai J:

INTRODUCTION

[1] This is an appeal by the appellant/defendant against the decision of the learned session's court judge ('SCJ') dated 8 November 2019 after a full trial which found the defendant negligent and ordered damages to be paid to the plaintiff.

[2] The appellant contends that the learned SCJ had erred in both his conclusions on liability as well as the amount of damages awarded.

[3] I will set out the facts of this matter and the various contentions of the parties in order to determine if the appeal herein has merits.

[4] For ease of reference, the parties will be referred to as they were in the court below.

BACKGROUND FACTS

[5] The plaintiff is a company which specialises in security labels whilst the defendant is a company which provides courier services.

[6] The plaintiff had utilised the defendant's services on 23 March 2017 to deliver a package from Penang to a customer of theirs in Macau.

[7] One Ms Lee of the plaintiff as PW1 at trial had testified that she placed the order for delivery through the defendant's online system at its webpage. PW1 confirmed in her testimony that the defendant's terms and conditions were brought to her attention which comprised a short form version (exh D8) and a long form version (exh D9). When PW1 had ticked the box that she accepted the terms and conditions, a consignment note was printed.

[8] The consignment note marked as exh P3 states that the consignment consisted of two packages weighing 7.47kg with a value of 4,000HKD. The service was indicated to be 'express'. Of significance, in the said consignment note, it expressly stated therein that the defendant's liability for loss, damage and delay is limited by the Warsaw Convention ('WC') or Montreal Convention ('MC'). The said consignment note also expressly states that the plaintiff as sender agrees that the general conditions which could be viewed at the defendant's given website address were acceptable and govern the contract. PW1 signed the said consignment note on the 23 March 2017.

[9] Although no specific date for delivery was stated, vide exh PA, the shipment tracking had stated that the shipment was estimated to be delivered on the 27 March 2017 before 6pm.

[10] The intended recipient of the said package, Trans-Fast Logistics Ltd ('TFL') in Macau did not receive the two packages and when contacted, the defendant informed that they were wrongly sent to Dubai instead. The plaintiff then asked the defendant to return the packages to the plaintiff in Penang which the defendant did on the 11 April 2017.

THE PLAINTIFF'S CLAIM

[11] Through its statement of claim, the plaintiff pleads that the defendant was supposed to deliver the goods to TFL in Macau by the 27 March 2017 or by latest 31 March 2017 and that by failing to do so, were negligent and had caused them a loss of RM892,092 being the loss of benefit of the order and revenue it would have received as TFL had terminated future orders of 4 million labels for the year 2017/2018. It also claimed a further sum of RM2,372.80 being the loss sustained as a result of the failure to ship the particular package to Macau.

[12] The defendant's pleaded defence can be summarised as follows;

(a) the defendant admits that the plaintiff used its services to deliver the package to Macau;

(b) that the consignment note constitutes the contract between the parties;

(c) denies that the plaintiff had required delivery by 31 March 2017;

(d) that the freight charges of RM217.70 was subsequently refunded via a credit note to the plaintiff;

(e) that the defendant's liability is governed by and limited by the Conventions as follows:

(i) cl 18(a) provides that notification of loss must be within 21 days

(which was not done by the plaintiff herein) and that loss was limited to 17 special drawing rights (SDR) per kg according to the WC and the MC;

(ii) in any event, cl12 of the terms and conditions limits liability to 17 Euros per kg;

(iii) pursuant to cl 13, the defendant is not liable for any loss of income etc arising from any breach.

(f) that the defendant had no obligation to deliver the packages by 27 March 2017 or 31 March 2017 and therefore there was no breach of contract;

(g) that the alleged loss of RM892,092 did not arise in the usual course, was not known, not reasonably foreseeable and therefore too remote;

(h) that the claim for RM2,372.80 was not payable as the package was ultimately returned to the plaintiff upon its request;

(i) denies negligence; and

(j) that there was no mitigation by the plaintiff.

GROUNDS OF JUDGMENT OF THE LEARNED SESSIONS COURT JUDGE (SCJ)

[13] At trial, the plaintiff produced two witnesses and the defendant one witness.

[14] The *alasan penghakiman* by the learned SCJ can be found in the *rekod rayuan tambahan*.

[15] Having perused the same, it would reveal that the learned SCJ proceeded in the following manner and made the following findings:

(a) the learned SCJ sets out the facts and the plaintiff's claim as well as the various contentions/defenses of the defendant before proceeding to list out the issues to be tried;

(b) the learned SCJ then proceeds to make the following findings:

(i) that it was not disputed that the package was wrongly sent to Dubai instead of Macau;

(ii) finds that there is negligence on the part of the defendant as SD1 had admitted that there were no unforeseen circumstances;

(iii) that SD1 had testified that the defendant had failed to deliver on the estimated time of 27 March 2017or 31 March 2017; and

(iv) that SD1 had admitted that it was the defendant's negligence/mistake in sending the package to the wrong place.

[16] On the specific defences raised, these were the findings of the learned SCJ:

(a) that the defendant could not rely on the exclusion clause in cl 13.1 of the terms and conditions based on s 29 of the Contracts Act and the Federal Court decision in the case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1 as being against public policy and was a standard term unilaterally imposed;

(b) that the defendant couldn't rely on cl 12.1(a) of the terms and conditions which limited liability to 17 SDR per kg as it was a unilateral imposition and that in any event, SD1 had testified that it is ambiguous and as such, the defendant cannot rely on it based on the *contra proferentum* rule based on the case of *Meuban Engineering & Equipment Sdn Bhd v MBF Insurans Bhd* [2014] 2 MLJcon 137; [2009] 7 CLJ 527;

(c) that the WC and the MC did not apply as they only apply to a 'high contracting party' or 'state party' and that there was no evidence that the defendant was either;

(d) the two Conventions state that they only apply to state or legally constituted public bodies which SD1 testified the defendant is not but instead was merely a private company;

(e) that the Conventions only apply to 'cargo' and that SD1 had testified that the plaintiff's consignment was not 'cargo' hence the Conventions were not applicable;

(f) on damages, the criteria set out in the case of *Hadley & Anor v Baxendale & Ors* [1854] EWHC Exch J70 as well as s 74 of the Contracts Act 1950 were satisfied as the loss was a direct consequence of the defendant's negligence;

(g) on the plaintiff's alleged delay in not adhering to issuing the notice of claim within 21 days, holds that cl 18(a) only applies to situations of loss, damage or delay;

(h) that the plaintiff's claim for losses of RM892,092 was not too remote as SP2 had testified that TFL cancelled the orders for 2017/2018 as a result of not receiving the delivery by 31 March 2017;

(i) that the plaintiff had informed one Mr Seger who was a representative or associate of the defendant that the delivery was urgent; and

(j) then allows all of the plaintiff's claims with costs of RM15,000.

THE GROUNDS OF APPEAL

[17] The appellant has in their memorandum of appeal and their submissions raised several grounds in support of this appeal which can be summarised as follows:

(a) on the issue of delivery on 27 March 2017 or 31 March 2017:

(i) contends that the learned SCJ ought to have held that the contract comprised the consignment note, the terms and conditions in both the short form and long form and that the contract thus formed on 23 March 2017 did not provide for delivery by those dates. Therefore, the learned SCJ ought to have held that no breach was occasioned as there was no agreed term on a delivery date. Further, that the said Mr Seger who was an employee of the third-party contractor had no authority to bind the appellant and therefore the learned SCJ erred in holding that Mr Seger was a representative or associate of the defendant; and

(ii) that the statement on the tracker of estimated delivery by 27 March 2017 was not a representation/guarantee or a contractual term. In any event, SP1 only checked the tracking on 7 April 2017.

(b) the laws governing the contract:

it is contended that the contract was indeed governed by the WC and the MC;

(c) no reasonable cause of action:

(i) article 24 of the WC and 29 of the MC excluded the plaintiff from making a claim in respect of international carriage by air; and

(ii) the plaintiff could only mount a claim under article 19 of the Convention which they did not do.

(d) no breach of contract:

even if it was a term that delivery was to be done 27 March 2017 or 31 March 2017, there was no mitigation by the plaintiff especially since the packages were returned to the plaintiff;

(e) time barred:

that the learned SCJ erred in holding that clause which required notice of a claim within 21 days did not apply;

(f) limitation of liability:

that the learned SCJ erred in concluding that the defendant's liability was not limited by virtue of cl 12 of the agreed terms and conditions;

(g) damages:
that the damages ought to have been limited by the contractual terms and/or the WC/MC;

(h) damages too remote:

(i) that the plaintiff had failed to prove damages ie in that they only alleged loss of revenue when it should be loss of profits. It is further contended that SP2's evidence on this aspect was unreliable; and

(ii) no basis to order the sum RM2,372.80.

(i) that the learned SCJ erred in dismissing the defendant's contention/reliance on the limitation of liability clause in cl 13 when he relied on the *CIMB* case. In this regard, the defendant submits that cl 13 was not an absolute exclusion clause and only excludes claims under the second limb of the *Hadley v Baxendale*; and

(j) no negligence:
that the learned SCJ erred in holding that the defendant was negligent as there was no duty of care to ensure delivery by 31 March 2017.

THE WRITTEN/ORAL SUBMISSIONS

[18] The parties have filed their written submissions and I heard extensive oral submissions from both learned counsel thereafter. I will set out the issues as they have arisen and to analyse the law and evidence with a view of determining if appellate intervention is warranted.

[19] At the outset, bearing in mind that this is an appeal against a decision made after full trial, I am aware of the law regulating appellate intervention whereby the appellate court must be satisfied that the findings of the trial judge are clearly wrong and cannot be justified on the available evidence (see the case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113).

[20] Foremost on my mind are the two tests namely, the 'plainly wrong' test and 'insufficient judicial appreciation of evidence' test for appellate interference in a subordinate court's finding. In respect of the two tests, the Court of Appeal held as follows in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at pp 98–99:

> (2) Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of

a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporaneous documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against these. He must also test the evidence of a witness against the probabilities of the case. The principle central to appellate interference is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.

[21] The Court of Appeal has reiterated in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors and another appeal* [2019] MLJU 38; [2019] 3 MLRA 322 at p 329 that:

[25] We are mindful of the limited role of the appellate court in relation to the findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanor and credibility of the witness before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant appellate interference merely because the appellate court entertains doubt whether such finding is right.

[22] In the more recent case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, after having looked at the various cases relating to the extent of intervention of an appellate court, the Federal Court concluded that an appellate court should not interfere with factual findings of a trial judge unless it was satisfied that the decision of the trial judge was plainly wrong or one that no reasonable judge could have reached.

ISSUE 1 — WHAT WAS THE CONTRACT AND WAS THERE A BREACH BY THE DEFENDANT?

[23] From the narration of facts above, there is no doubt that the terms and conditions which regulated the contract are those as contained in the short form version as per exh D8 and the long form version in exh D9. The plaintiff themselves had at the point of executing the consignment note on 23 March 2017 agreed that those terms would be the general conditions that bind the contract. In fact, parties as well as the learned SCJ appears to have conducted themselves throughout by reference to those very same terms and conditions but were focused on the applicability or otherwise of the specific terms therein.

[24] The defendant contends that neither the terms and conditions nor the consignment note makes any reference to a delivery date of 27 March 2017 or 31 March 2017 and as such, there is no express or implied term to deliver on those dates and hence there was no breach/negligence.

[25] Even though the terms and the consignment note did not specify a time

for delivery, does that mean that time to deliver was at large? I think not. Surely delivery ought to be made within a reasonable period and most certainly to the proper addressee. In this case there is no dispute at all that the package was never sent to the intended recipient in Macau but wrongly sent to Dubai.

[26] The learned SCJ had referred to the testimony of SD1 who had admitted that the defendant had failed to deliver the package by the estimated date of 27 March 2017 and that such was due to the mistake or negligence of the defendant and that there were no unforeseen circumstances that caused the mistaken delivery. In fact, if one refers to exh D18 which is the defendant's letter dated 6 June 2017 in reply to the plaintiff's solicitor's letter of demand, it states that 'We regret that the *consignment was not delivered within the quoted transit time* and was subsequently delivered back to Mega Security Devices (M) Sdn Bhd on 11 April 2017 as per their request'. (Emphasis added.)

[27] Further, on the issue of the delivery to be done by the 27 March 2017 or 31 March 2017, I note that in the consignment note, the service has been described as 'express'. This fact when viewed with the tracking of shipment in exh P4 where the defendant themselves have estimated delivery to be before 6pm on 27 March 2017, is clearly sufficient in my view to cast an obligation or duty upon the defendant to have delivered the package to the intended addressee by the 27 March 2017 or 31 March 2017 at the latest.

[28] As such, I have no hesitation in concurring with the decision of the learned SCJ that the defendant was negligent when they did not deliver the said package to the intended addressee by the end of March 2017.

ISSUE 2 — THE APPLICABILITY OF THE WARSAW AND/OR MONTREAL CONVENTION AND/OR THE LIMITATION OF LIABILITY UNDER THE TERMS AND CONDITIONS OF THE CONTRACT

[29] It is the cornerstone of the defendant's case that the Conventions apply and that by virtue of this, the provisions therein limiting liability are applicable. The relevant section is s 6 of the Carriage by Air Act 1974 and articles 18, 19 and 22(3) of the MC.

[30] As seen earlier, the plaintiff in the consignment note which PW1 executed had expressly stated therein that liability was limited by such Conventions and that the terms and conditions applied. There is no dispute that the defendant had in their statement of defence expressly referred to the various clauses of the terms and conditions and pleaded that their liability is limited by virtue of the same.

[31] From a perusal of paras 27–30 of the grounds of judgment, it is clear that the learned SCJ had considered the applicability or otherwise of the Conventions. He however concluded that they are not applicable as article 1(2) states that it applies to 'a high contracting party' or a 'state party' and that there was no evidence that the defendant was either. The learned SCJ also concluded that the said Conventions are not applicable on the basis that they applied to 'cargo' which SD1 had testified that the plaintiff's consignment was not considered as 'cargo'.

[32] It is also contended by the plaintiff that articles 18(1) and 22(3) only apply in cases of loss, damage or delay and not for cases of nondelivery as was the situation in this case. The defendant on the other hand contends that although silent, the non-delivery or mis-delivery of the packages to Dubai was covered by the aforesaid articles and relies on cases such as *Air India Ltd v Tej Shoes Exporters P Ltd & Another* [LNIND] [2013] DEL 1119 and *India Airlines v Angelique International Ltd & Another* [LNIND] [2014] DEL 5627. In my considered view, there is certainly merit in the defendant's submission that the learned SCJ had erred when he held that the Conventions were inapplicable on the basis that the defendant was not a high contracting party or a state party. A high contracting party and a state party in my view do not refer to the defendant per se but rather the countries that are signatories to the Convention. In this regard, Macau and Malaysia have been certified as state parties to the Carriage by Air Conventions.

[33] However, in relation to the reference to 'cargo' in article 1(1), there is no dispute that both Conventions provide that they apply to all international carriage of persons, baggage or cargo. In this regard, the defendant submits that the consignment that was sent for the plaintiff was in fact cargo. However, this would appear to be inconsistent with its own witness's testimony that the packages sent were not and could not be considered as cargo. Furthermore, I also note that there is no reference to 'cargo' anywhere in the consignment note or in the subsequent correspondences. The consignment note merely refers to the word 'package' and the defendant's letter dated 6 June 2017 refers to 'subject consignment'.

[34] The defendant contends that it was the objective intention of the parties to treat the two packages as cargo within the Conventions and not a matter for SD1 to testify on. In my view, there appears to have been insufficient evidence to substantiate such objective intention and the court was thus properly swayed by the evidence of the defendant's own witness that the packages were not considered cargo. Under such circumstances, on the basis that the consignment/package was not 'cargo', it is arguable that the Conventions do not apply.

[35] However, even if the learned SCJ was right in his conclusion that the Conventions did not apply, that is not the end of the matter. The defendant had at para 5 of its statement of defence pleaded limitation of liability under cll 12(1)(a), 12(1)(c) and 13 of their terms and conditions which read as follows:

> 12(1)(a) if the carriage of your shipment is solely or partly by air and involves an ultimate destination or a stop in a country other than the country of departure the Warsaw Convention (1929), or the Warsaw Convention as amended by the Hague Protocol (1955) and/or Montreal Protocol No 4 (1975), or the Montreal Convention (1999), whichever is compulsorily applicable, will apply. These international treaties govern and limit our liability for loss, damage or delay to your shipment to 17 special drawing rights per kilo (approximately 20 Euros per kilo although the rate of exchange is variable).
>
> 12(1)(b) if we carry your shipment by road within, to or from a country that is a party to the convention on the contract for the international carriage of goods by road 1956 (CMR) our liability for loss or damage to your shipment shall be governed by the CMR and thus limited to 8.33 special drawing rights per kilo (approximately 10 Euros per kilo although the rate of exchange is variable). In the case of delay where you can show to us you have suffered loss our liability is limited to refunding to you the charge you paid us for carriage in respect of that shipment or the part which was delayed.
>
> 12(1)(c) if none of the above conventions apply and we have a liability to you for whatever reason, including without limitation breach of contract, negligence, willful act or default, our liability to you for loss, damage, mis delivery or non-delivery of your of your shipment or the part affected is at all times limited to the lower of the market value of the shipment at the time of carriage or the cost of repairing the shipment or the part affected with in each case an upper limit that does not exceed 17 Euros per kilo limited to a maximum of 10,000 Euros per shipment. In the case of delay where you can show to us you have suffered loss our liability is limited to refunding to you the charge you paid us for carriage in respect of that shipment or the part which was delayed.
>
> 12(2) Subject to condition 13 below, if we have a liability relating to other services for whatever reason, including without limitation breach of contract, negligence, willful act or default, our liability to you is at all times limited to 10,000 Euros per event or series of events with one and the same cause of damage or, in case of the loss of or damage to a shipment, to the lower of the market value of the shipment or the cost of repairing the shipment or the part affected with in every case an upper limit that does not exceed 3.40 Euros per kilo with a maximum of 10,000 Euros per event or series of connected events.
>
> 13 Exclusions
>
> 13(1) We will not be liable for any loss of income, loss of profits, loss of market, loss of reputation, loss of customers, loss of use, loss of an opportunity even if we had knowledge that such damages or loss might arise or for any indirect, incidental, special or consequential damages or loss howsoever arising including without limitation breach of contract negligence, willful act or default.

13(2) We are not liable if we do not fulfil any obligations towards you at all as a result of:

13(2)(a) circumstances beyond our control such as (but not limited to):

— acts of god including earthquakes, cyclones, storms, flooding, fire, disease, fog, snow or frost;

— force majeure including (but not limited to) war, accidents, acts of public enemies, strikes, embargoes, perils of the air, local disputes or civil commotions;

— national or local disruptions in air or ground transportation networks and mechanical problems to modes of transport or machinery;

— latent defects or inherent vice in the contents of the shipment;

— criminal acts of third parties such as theft and arson.

[36] From the above, it will become clear that cl 12(1)(c) of the agreed terms and conditions expressly provides that even if the Conventions were inapplicable, the defendant's liability is limited to 17 Euros per kg up to a maximum of 10,000 Euros per shipment. It is interesting to note that cl 12(1)(c) limits the liability for loss, damage, *mis-delivery or non-delivery* of any shipment. However, a perusal of the grounds of judgment will reveal that the learned SCJ makes no reference whatsoever to and does not consider cl 12(1)(c). He only referred to cl 12(1)(a) and held that it was a standard and unilateral clause indirectly forced on the plaintiff and that SD1 had testified that it was an ambiguous clause whereby the *contra proferentum* rule thus applied.

[37] In my considered view, cl 12(1)(a) is not ambiguous and neither was there any evidence that it was unilaterally imposed on the plaintiff. The evidence was that parties have been dealing for several years in like manner on the same terms. In any event and in my view, the learned SCJ ought not to have merely relied on SD1's testimony in this regard but had a duty to determine for himself whether it was ambiguous which he did not do. See the case of *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96.

[38] Even proceeding on the basis that the Conventions and thus cl 2(1)(a) was not applicable, the court rather than considering cl 12(1)(c), however proceeded to decide that the exclusion of liability clause in cl 13(1) was void by reason of s 29 of the contracts and the decision of the Federal Court in the case of the *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1; [2019] 2 CLJ 1. In my view, reliance on the *CIMB* case was erroneous as the facts there were very different. Firstly, the *CIMB* case concerned a clause which provided for an absolute exclusion of liability. In this case, cl 13(1) only excluded the defendant's liability which fell within the second limb of the rule in the case of *Hadley v Baxendale*.

A **[39]** As such, since cl 13 did not bar claims which fell under the first limb or *Hadley v Baxendale*, it did not contravene s 29 of the Contracts Act. As such, in my view, cl 12(1)(c) of the terms and conditions are applicable and that the defendant's liability for the mis-delivery or non-delivery should be limited to 17 Euros per kg.

B

[40] In this regard, I also note that cll 15 and 16 of the terms and conditions allow the customer to increase the limits of liability which the plaintiff admitted they did not do in this case.

C

[41] In the final analysis, I would conclude that the defendants liability was indeed limited by virtue of the agreed terms and conditions of contract.

[42] As such, considering my view above that the defendant's liability ought
D to have been limited to 17 Euros per kg, since the consignment note states that the package weighed a total of 7.47kg, the defendant's liability ought to be limited to a sum of 126.99 Euros. On the facts of this case, since the exchange rate was 4.5544, this would translate to a sum of RM578.94.

E

[43] Taking all the above into account, and having considered the facts, the terms of the contract and the applicable law, l would conclude that the learned SCJ had fundamentally misdirected himself in awarding the amount of damages as he did. I would thus allow the appeal and reduce the judgment amount from the sum of RM892,092 to an amount of RM578.94.

F

[44] In light of my views above on the applicability of cl 12(1)(c), I find that there is also no basis to have awarded the sum of RM2,372.80.

G **[45]** As a consequence, my conclusion above, there is no need in my view to discuss the correctness or otherwise the decision of the learned SCJ which awarded damages in the amount of RM892,092 on the basis that it was a loss suffered as a direct consequence of the negligence. Suffice however for me to say that I find merits in the defendant's submissions that the awarding of the same
H was erroneous on the facts of this case as being too remote.

[46] In the final analysis and conclusion, for the reasons enumerated above, I am of the opinion that appellate intervention is warranted as the findings made by the learned SCJ were erroneous in light of the terms and conditions of
I the agreement which bound the parties. As such, I allow this appeal in part whereby the findings of the learned SCJ that the defendant was negligent is affirmed but the appeal on the quantum of damages allowed and reduced to an amount of RM578.94.

[47] As for costs, in my view, it is fair that there be no order as to costs for this appeal. As for the costs awarded of RM15,000 in the court below, in my view, the plaintiff should still be awarded some costs as they had succeeded in proving its claim for negligence. However, I would reduce the costs awarded in the court below to a sum of RM10,000 in light of the amount of damages awarded.

Appeal allowed in part; SCJ's finding on negligence affirmed; damages reduced to RM578.94; costs reduced to RM10,000.

Reported by Dzulqarnain Ab Fatar